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January 9, 2001

Hon. Viktor V. Pohorelsky
United States Magistrate Judge
United States District Court for
the Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *European Community v. RJR Nabisco, Inc., et al.*
00-CV-06617 (NGG)

Dear Judge Pohorelsky:

On behalf of the Defendants in the above-referenced action, I write in response to the January 8, 2001 letter to this Court from John J. Halloran filing *ex parte* and *in camera* the retainer agreement with the European Community and a memorandum in opposition to disclosure of the agreement to defendants. We request that the Court reject plaintiffs' unjustified interpretation of this Court's order of December 21, 2000 and reiterate its order that plaintiffs' counsel must (1) produce *in camera* all of the presently governing contingency fee retainer agreements that plaintiffs' counsel have with the European Community and with each of the plaintiff Departments of Colombia in this action; and (2) serve immediately upon defendants' counsel the brief filed by plaintiffs' counsel contending that the retainer agreements should not be disclosed to defendants.

This Court most certainly did not authorize plaintiffs' counsel to file its brief *ex parte*, and there is no federal rule or order of this Court that has authorized such conduct.

The transcript of the December 21 hearing before this Court reveals that the Court stated that our application for discovery, a copy of which is attached hereto, was denied "except insofar as it requests copies of the retainer agreements themselves." (Tr. 99.) Defendants' discovery request had expressly requested all of the retainer agreements, including those of each plaintiff Department of Colombia. In this connection, we note that each of the retainer agreements with Departments of Colombia that defendants have thus far obtained, as a result of their being public documents in Colombia required to be filed, expressly provides that plaintiffs' attorneys "may file the fee agreement with the Court where the complaint was filed" and that this Court may "enforce" the agreement. (See, e.g., Exhibit D-1 of Notice of Motion of November 8, 2000, ¶10.) There is no

suggestion in the retainer agreements themselves that the filing or the enforcement action would be under seal. Accordingly, we respectfully suggest that the agreements – which, as noted, are public documents under the laws of Colombia – were never intended to be kept confidential. Moreover, as I stated at the hearing (Tr. 89), whatever the clients or attorneys intended, the law in this Circuit is that fee arrangements with clients are not privileged. *See Lefcourt v. United States*, 125 F.3d 79, 86(2d Cir.1997); *In Re Two Grand Jury Subpoena Duces Tecum*, 793 F.2d 69, 71-73 (2d. Cir. 1986).

With respect to the brief, the transcript makes absolutely clear that the Court always contemplated that any arguments would be made in the presence of the defendants. The Court offered the plaintiffs an opportunity in open court at the December 21 hearing to make any arguments they had against disclosure but generously gave plaintiffs' counsel more than two weeks to file a brief and gave defendants one week to respond.

The transcript reveals that the Court stated: "I'll give you [plaintiffs' counsel] a chance to brief why that should not be turned over, but typically... contingent fee agreements are I believe required to be filed in the state of New York.... If they are supposed to be filed, there is no reason why they should not be, it seems to me, made available to opposing counsel. I'll let you be heard on that, either now or within the next couple of days, if you're not prepared to address it now." (Tr. 99.)

Plaintiffs' counsel, Mr. Halloran, stated that he would like to check the law and later provide citations to the Court. (Tr. 99.) Thereafter, the Court granted plaintiffs until January 8 to file their brief and defendants until January 15 "for any opposition." (Tr. 101.) It was clear that the agreements would be produced *in camera* prior to the Court's determination of whether they would be turned over to the defendants, but nothing was said about submitting the brief *ex parte*. There is no effective way that an opposition can be submitted to a memorandum that is never seen. Nowhere in the hearing was it ever suggested or implied that the brief on the issue of disclosure was to be filed *ex parte* or that defendants would be required to respond to contentions they had never seen.

Accordingly, we respectfully request that the Court order plaintiffs' counsel to serve immediately on defense counsel the brief it filed with this Court on January 8 and that defendants have until one week after the receipt of that brief to respond to it in order to demonstrate that the retainer agreements should be disclosed to defendants.

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Thank you for your consideration.

Respectfully submitted,

/s/

Irvin B. Nathan

Enclosure

cc: All Counsel of Record